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ALEXANDER L. STEVAS,

Case No. 82-477

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

H. J. T. HERZOG,

Petitioner,

vs

DAYTON BAR ASSOCIATION and
OFFICE OF DISCIPLINARY COUNSEL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Rule V(7) of the Ohio Supreme Court Rules for the Government of the Bar:

> Effect of Discipline: . . . A person who has been suspended for an indefinite period from the practice of law and thereafter reinstated in the manner hereinafter provided shall be disbarred upon being found guilty of subsequent misconduct . . .

2. Disciplinary Rule 9-102 (B) (4) of the Ohio Code of Professional Responsibility:

> A lawyer shall promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

3. Disciplinary Rule 6-101 (A) (3) of the Ohio Code of Professional Responsibility:

> A lawyer shall not neglect a legal matter entrusted to him.

4. Disciplinary Rule 2-103 (A) of the Ohio Code of Professional Responsibility:

> A lawyer shall not recommend employment as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.

5. United States Constitution, Amendment Fourteen:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws.

6. United States Constitution, Amendment One:

> Congress shall make no law . . . abridging the freedom of speech.

7. United States Constitution, Article I, Section 9:

> No Bill of Attainder or ex post facto law shall be passed.

8. United States Constitution, Amendment Five:

> . . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

STATEMENT OF THE CASE

On April 13, 1981, Respondent Dayton Bar Association and the Office of Disciplinary Counsel filed a Complaint against Petitioner with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. The Complaint contained four claims of misconduct under the Ohio Code of Professional Responsibility. A hearing was held before a panel of the Board on November 5, 1981 and November 6, 1981. The Board filed its Findings of Fact and Recommendation with the Ohio Supreme Court on January 29, 1982.

The Board found Petitioner guilty on three of the four claims. The first claim concerned the failure of Petitioner to promptly turn over to his client funds collected on behalf of the client. The Board found this to be a violation of Disciplinary Rule 9—102 (B) (4) of the Ohio Code of Professional Responsibility.

The second claim involved Petitioner's representation of two other clients, the plaintiffs in a personal injury case which was ultimately voluntarily dismissed without either of his clients' consent. The Board found that this conduct was in violation of DR 6—101 (A) (3) which prohibits a lawyer from neglecting a legal matter entrusted to him.

The third claim concerned the mailing by Petitioner of approximately 1,000 letters to persons who were listed as defendants in collection actions filed in the Dayton Municipal Court. Petitioner obtained the names and addresses of these individuals from the "Daily Court Reporter". One letter refers to the suit against the recipient and questions whether or not other creditors are also seeking payment from the recipient. The letter goes on to advise that a new federal law may protect the recipient's employment, possessions and wages. The letter urges the recipient to

contact Petitioner in order "to take advantage of this law" (Appendix A). The second letter states that "the normal sequence of events will mean that judgment will be taken against you and your wages garnisheed. . . " This letter also informs the recipient of the new federal law that would protect the recipient from repossessions, bill collectors, foreclosures and the like. The recipient is urged to contact the office of Petitioner (Appendix B). The Board found that this activity violated DR 2–103 (A) of the Ohio Code of Professional Responsibility.

Petitioner had previously been indefinitely suspended from the practice of law on April 18, 1962. His first Petition for Reinstatement was rejected on January 20, 1972. On the second time Petitioner sought reinstatement, his request was granted (June 19, 1975). Although the Board noted that a suspension for one year from the practice of law would be warranted for the violations of Petitioner, the Board went on to recommend that Petitioner be permanently disbarred pursuant to Section 7 of Rule V of the Ohio Supreme Court Rules for the Government of the Bar. Ohio Gov. Rule V (7) requires the permanent disbarment, upon any finding of further misconduct by a practitioner reinstated after a previous indefinite suspension.

Petitioner filed objections to the report of the Board and the matter was briefed and argued before the Supreme Court of Ohio. Throughout these proceedings, Petitioner raised essentially two arguments: (1) the conduct of Petitioner was not serious enough to warrant permanent disbarment; and (2) the letters mailed by Petitioner to defendents in collection actions were protected under the First Amendment to the United States Constitution.

Petitioner did not, however, ever raise the other questions presented in his Petition for Writ of Certiorari, which relate to the sanction of disbarment. Specifically, the challenges to Ohio Gov. Rule V (7) as violating the equal pro-

tection and the due process clauses of the Fourteenth Amendment to the United States Constitution, the prohibitions against Bills of Attainder and ex post facto laws (Article I, Section 9 of the United States Constitution), and the prohibition of double jeopardy in the Fifth Amendment to the United States Constitution were never raised in these proceedings until the Petition for Writ of Certiorari was filed.

The Supreme Court of Ohio affirmed the Findings of the Board of Commissioners that Petitioner had violated all three disciplinary rules described above. The Ohio Supreme Court ruled that Petitioner be permanently disbarred from the practice of law noting that the violations of the disciplinary rules regarding prompt payment of money to clients and prohibiting the neglect of legal matters were serious enough to require disciplinary action. Since he had previously been indefinitely suspended, permanent disbarment was appropriate pursuant to Ohio Gov. Rule V(7). The Court went on to comment that although the findings of misconduct for solicitation did not affect the result, the potential for overreaching in Petitioner's solicitation of clients would justify a sanction for that misconduct as well.

ARGUMENT IN OPPOSITION TO GRANTING CERTIORARI

A. PETITIONER FAILED TO RAISE AND THE COURT BELOW DID NOT RULE UPON ANY CLAIMS REGARDING THE CONSTITUTIONALITY OF OHIO GOV. RULE V(7).

The record shows that Petitioner did not raise any issues regarding the constitutionality of Rule V(7) of the Ohio Supreme Court Rules for the Government of the Bar. Instead, Petitioner relied upon an argument that since his conduct was not egregious, disbarment was inappropriate. While finding disbarment to be necessary, the Ohio Supreme Court had no opportunity to and did not rule on the constitutional issues presented in the Petition (See Appendix A of Petition).

This Court has repeatedly ruled that it will not decide issues raised for the first time in a Writ of Certiorari. *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) and *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Any claim of invalidity of a state statute "and the ground therefor [must] be brought to the attention of the state court with fair precision and in due time". *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). Having failed to raise the constitutional issues regarding Ohio Gov. Rule V(7) (Questions 2-6 in the Petition) in a timely manner, Petitioner should be precluded from presenting them to this Court for review.

B. THE DECISION OF THE OHIO SUPREME COURT TO PERMANENTLY DISBAR PETITIONER RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

This Court has recognized the traditional power of the states and their very strong interest in regulating the membership of the bar and the practice of law. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957) and *Law Students Research Council v. Wadmond*, 401 U.S. 154, 159 (1971). In Ohio, a determination has been made that a finding of misconduct after an indefinite suspension and reinstatement warrants the most severe sanction: permanent disbarment. This rule in effect January 1, 1957, was contained in Supreme Court Practice Rule XXVII, the predecessor to Ohio Gov. Rule V. *See*, Schroeder, O., *Lawyer Discipline: The Ohio Story*, pp. 16-23, 141 (1967) and *Cleveland Bar Association v. Pleasant*, 167 Ohio St. 325 (1958).

Petitioner's latest violations of the disciplinary rules include the neglect of a client's legal action and the failure to promptly return client's funds to that client, both serious violations of the mandatory rules. *See*, DR 9-102 (B) (4) and 6-101 (A) (3). In view of Petitioner's previous indefinite suspension, the Supreme Court simply applied Ohio Gov. Rule V(7) and ruled that Petitioner be disbarred.

The evaluation of a practitioner's conduct and appropriate discipline to be employed are questions of state law, not federal law. *See, e.g., In re Witte*, 615 S. W. 2d 421, *cert. denied*, 102 S. Ct. 559 (1981). The decision of the Ohio Supreme Court regarding Petitioner's fitness to practice law thus rests on adequate and independent state grounds, not properly before this Court. *Herb v. Pitcarin*, 324 U.S. 117, 125 (1945) and *Jankovich v. Indiana Toll Road Comm.*, 379 U.S. 487, 489 (1965).

Even assuming that Petitioner's constitutional claims may properly be raised before this Court, none of those claims raises a substantial federal question. Petitioner admits that the state need only show a rational basis for

Ohio Gov. Rule V(7) to reject an equal protection challenge (Petition, p. 9). A conclusion that two separate incidents of serious misconduct require that an attorney be disbarred is clearly a reasonable distinction between Petitioner and other practitioners. *Cf, In re Professional Ethics Advisory Comm. Op.*, 444 A. 2d 1092, 1102 (N.J. Sup. Ct. 1982) *appeal docketed*, 51 U.S.L.W. 3075 (July 26, 1982) (No. 82-139) and *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464-466 (1981). Petitioner's argument regarding due process likewise lacks merit. *In re Ruffalo*, 390 U.S. 544 (1968).

Restrictions in effect prior to Petitioner's first penalty for misconduct are "proper qualifications for a profession" and violate neither the Bill of Attainder clause not the ex post facto clause of Article I. *DeVeau v. Braisted*, 363 U.S. 144, 166 (1960). *See also, Weaver v. Graham*, 450 U.S. 24, 29 (1981). Even assuming that the double jeopardy clause applied to these proceedings, Petitioner's claim of double jeopardy does not comport with the facts. Petitioner received one sanction — permanent disbarment — not two as alleged on pages 14-15 of the Petition. Finally, attorney disciplinary proceedings are *sui generis*, not criminal, and the full panoply of constitutional rights available to defendants in criminal cases has never been held to be available in attorney disciplinary proceedings.

C. A FINDING THAT PETITIONER'S LETTERS VIOLATED DR 2-103 (A) IS CONSISTENT WITH RECENT DECISIONS OF THIS COURT AND DECISIONS FROM OTHER STATE COURTS.

Petitioner's letters (Appendix A and B) reflect the "abuses that the states have a legitimate interest in con-

trolling". *In the Matter of RMJ*, 102 S. Ct. 929, 937 (1982). Petitioner targetted the letters to persons with whom he had no previous contact solely for the purpose of obtaining remunerative employment. The recipients were defendants at risk of economic loss in pending court proceedings and were thus particularly vulnerable to this type of solicitation. Such solicitation is inherently overbearing and intrusive and thus falls within the area where state interests are particularly strong. *Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447, 464-468 (1978); *Florida Bar Assoc. v. Schrieber*, 407 So. 2d 595, 599 (1981); and *Kansas v. Moses*, 642 P. 2d 1004, 1007 (1981). *Cf In the Matter of Greene*, 433 N.Y.S. 2d 853 (Sup. Ct. 1980), 54 N.Y. 2d 118 (1981), *cert. denied*, 102 S. Ct. 1738 (1982). Furthermore, rather than serving an informational purpose, these letters constitute scare tactics designed to lure the consumer into Petitioner's office regardless of individual circumstances. This type of misleading and deceptive promotional language may properly be restricted by Ohio to protect the public. *Ohralik*, *supra*, at 459; *In re Primus*, 436 U.S. 412, 426 (1978). *Cf Friedman v. Rogers*, 440 U.S. 1, 15 (1979).

Thus, there is no conflict between Ohio's regulation of Petitioner's direct mail solicitation and the decisions cited by Petitioner in his brief (page 7). Each case applies the principle that where accurate, factual information is conveyed to the public, the state may not discipline the attorneys for simply conveying that information. None of these cases, however, involved solicitation which is misleading to the consumer. *See, e.g., In the Matter of Koffler*, N.Y. 2d 140, 146 (1980) *cert. denied*, 450 U.S. 1026 (1981). The State of Ohio may regulate the solicitation of Petitioner in order to protect the public from overreaching and deception by members of the Bar.

CONCLUSION

This Court must first determine whether it should hear constitutional challenges to a long-standing rule of the Ohio Supreme Court that have not been raised at any prior time in these proceedings. Respondents submit that these questions should not be considered by this Court.

Secondly, as to the constitutionality of the applications of DR 2-103(A) to the facts at hand, Respondents submit that even if this Court determined the application was improper, such a determination would not affect the Ohio Supreme Court's disposition of this case based upon the clear finding of professional misconduct for failure to timely reimburse a client's funds and neglect of a separate legal matter. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been served upon the Petitioner, H. J. T. Herzog, by forwarding such copies to the office of his counsel, Herbert Creech, Jr., 7211 Taylorsville Road, Dayton, Ohio, 45424, by United States mail, first class postage prepaid, this 20th day of October, 1982. I further certify that all parties required to be served have been served.

Charles W. Kettlewell
Counsel of Record for Respondent
Office of Disciplinary Counsel

APPENDIX A

LAW OFFICES
H. J. T. HERZOG
HARRIES BLDG.
137 N. MAIN STREET
DAYTON, OHIO 45402
222-3781

You were sued in the Dayton Municipal Court. Are other creditors and bill collectors after you?

There is a new federal law that can save your job, car, bank account, stop repossessions and garnishments and gas and electric turn-offs.

To learn how to take advantage of this law, call for an appointment at your own convenience, including evenings or Saturdays. Ask for Mrs. Carter.

Be sure to say what the appointment is for so forms to list necessary information can be sent to you.

Remember, this is not bankruptcy.

Very truly yours,

/s/ H. J. T. HERZOG

HJTH:blw
DP—C

APPENDIX B

LAW OFFICES
H. J. T. HERZOG
HARRIES BLDG.
137 N. MAIN STREET
DAYTON, OHIO 45402
222-3781

February 19, 1980

Mr. and Mrs. Lary Eugene Snell
5309 Weddington Drive
Trotwood, OH 45426

Dear Mr. and Mrs. Snell:

The Daily Court Reporter lists you as a Defendant in a collection suit.

The normal sequence of events will mean judgment will be taken against you and your wages garnisheed; your assets, including your bank account and car or cars attached; and if you own real estate, a lien placed against it, which could be the basis for a suit to sell your real estate.

Garnishment by one creditor could not be cause for your employer to fire you; however, it is rare that you would only have one creditor so delinquent that suit was necessary. If two creditors started garnishments, you could legally be fired by your employer.

There are remedies available to you to prevent garnishment. A new federal law protects you from bill collectors, repossessions, home foreclosures, gas and electric turn-offs, garnishments, sale of your car and other assets.

You also have options under the new federal laws to protect your job and bank accounts. And you can not only stop bill collectors, but even governmental agencies.

To learn about these remedies, call for an appointment to review your problems. Ask for Mrs. Adams.

You will need to bring certain information to help decide the best course for you. Forms to list the information will be sent to you to bring to your appointment.

Appointments can be made at your convenience in the evening and on Saturdays.

Very truly yours,

/s/ H. J. T. HERZOG

HJTH:blw